

years from the date of license grant, the qualifying control group members' minimum equity requirement may be reduced to 10 percent of the licensee's total equity.²¹

There are two exceptions to this minimum 15 percent control group equity rule.

First, if there is a sole control group investor and that investor is a designated entity business that has operated and earned revenues for at least two years prior to December 31, 1994, such an investor may hold as little as 10 percent of the applicant's equity. the other 15 percent of the control group's equity may be held as stock options or shares by:

(1) qualifying principals in the control group; (2) individuals who are members of an applicant's management team (who may be "non-qualifying"); or (3) existing investors of businesses in the control group that were operating and earning revenues for two years prior to December 31, 1994.

Second, small, publicly-traded corporations with widely dispersed voting stock ownership may be exempt themselves entirely from the control group requirement if they own all of the equity and voting stock of the entrepreneurs' block applicant or licensee. To qualify for the exemption, no person may own more than 15 percent of the equity in the corporation, nor have the power to control the election of more than 15 percent of the corporation's board of directors.

²¹ The control group must at all times maintain 50.1 percent of the applicant's voting rights. While not explicitly addressed in the Commission's Order, the staff has informally stated that non-qualified investors that are permitted to invest in the control group may hold voting rights as long as such voting rights do not amount to control of either the control group itself or the applicant, in combination with investors outside the control group.

b. *Nonattributable Interests*

Under the FCC's revised rules, an investor participating outside the control group may hold up to a 25 percent equity interest, including voting rights of up to 25 percent, without its gross revenues and assets being attributed toward the financial caps. Within the control group, the gross revenues and total assets of those permitted nonqualifying investors also would not be attributed.²²

For the purposes of these regulations, nonattributable interests are defined to include limited partnership interests, non-voting stock interests, or voting stock interests of 25 percent or less of the issued and outstanding stock. For partnerships, joint ventures and other non-corporate entities, nonattributable equity investment means limited partnership interests and similar interests that do not have the power to exercise control over the applicant. The control group must hold all general partnership interests and describe a means of ensuring control on the long form application.²³ In the case of a corporate investor, whether publicly traded or non-publicly traded, a nonattributable equity investor means an investor who holds only nonvoting stock or stock that includes no more than 25 percent of the total voting equity. The 25 percent nonattributable equity limitation applies even if different classes of stock are held. Persons or entities that are affiliates of one another, or that have an "identity of interests," will be treated as though they are one person

²² See Section III(E)(1)(a) (defining permissible, nonqualifying investors).

²³ One means of ensuring control, for example, might be a voting trust agreement.

or entity and their interests aggregated for purposes of determining compliance with the maximum nonattributable equity limits.²⁴

Where principals and noncontrolling investors hold indirect interests in control group members, the ownership percentages for each link in the vertical ownership chain will be multiplied successively for purposes of determining compliance with the control group's minimum and nonattributable equity requirements. In contrast to the approach used in the cellular attribution rules, interests over 50 percent will also be multiplied successively rather than being treated as if they were 100 percent.²⁵ For example, if a woman holds a 25 percent equity interest in a corporate member of the control group, and that corporation holds a 25 percent equity interest in the applicant, the woman's effective interest would be 6.25 percent (0.25×0.25), which does not fulfill the 15 percent minimum equity requirement. If a noncontrolling, nonqualifying investor holds a 40 percent interest in a corporate member of the control group, and that corporate holds a 25 percent equity interest in the applicant, the investor's effective interest would be 10 percent (0.25×0.40). Thus, if the same investor also owns more than 15 percent of the applicant's equity outside of the control group, it would exceed the 25 percent nonattributable equity limit.

²⁴ See Section III(E)(4)(c). For example, if two entities form a joint venture or consortium to apply for broadband PCS block A and B licenses, they have an identity of interests and will be treated as a single entity when investing in the same entrepreneurs' block applicant.

²⁵ See Section II(C)(3)(a) (attribution of cellular interests).

c. Financial Benefits Requirements

In addition to the limitations set forth above for financial ownership and control of entities qualified to bid in the entrepreneurs' blocks, the FCC has adopted several other requirements concerning the flow of financial benefits. Control group members must generally be entitled to *pro rata* shares of financial benefits. In this regard, the FCC has clarified that control group members must receive dividends, profits, and regular and liquidating distributions in proportion to the equity holdings they actually possess, rather than in proportion to their interests in the total equity (which may include options not yet exercised).²⁶ There are also some specific requirements, depending upon whether the applicant is a corporation or a partnership.

For corporations, at least 50.1 percent of the dividends paid on the voting stock must be paid to the applicant's control group members. Control group members also must be entitled to receive 100 percent of the value of each share of stock in their possession. Similarly, in the case of dissolution or liquidation of the corporation, the control group must be entitled to receive at least 25 percent of the retained earnings of the concern, and 100 percent of the value of each share of stock in their possession.²⁷

Partnerships and other non-corporate entities are subject to similar requirements. The indicia of ownership the FCC will consider in non-corporate cases include, but are not limited to:

²⁶ However, designated entities and their partners may allocate tax benefits among themselves on a non-*pro rata* basis.

²⁷ This requirement is subject to any applicable laws requiring debt to be paid before distribution of equity.

- the right to share in profits and losses *pro rata*;
- the right to receive assets or liabilities *pro rata* upon liquidation; and
- the absence of opportunity to dilute the interests of designated entities, through capital calls or otherwise.

The goal is to ensure that the economic benefits generated by the rules governing the entrepreneurs' blocks actually flow to designated entities.

d. Five-Year Holding Rule and Limited Transfer Period

The FCC also restricts the transferability of PCS licenses won at auction. Licensees in the entrepreneurs' blocks may not voluntarily assign or transfer control of their licenses for a period of three years from the date of the license grant.²⁸ For the fourth and fifth year of the original license term, the licensee may assign or transfer control of its authorization only to an entity that either holds entrepreneurs' block licenses or that satisfies the entrepreneurs' blocks eligibility criteria at the time of transfer. During this five-year period, licensees will continue to be bound by the financial caps established.²⁹ Similarly, a transferee or assignee who receives a C or F block license during the five-year period will also remain subject to the transfer restrictions for the balance of the holding period.

²⁸ Exceptions to this three-year holding period rule will be considered on a case-by-case basis in the event of a judicial order decreeing bankruptcy or a judicial foreclosure if the licensee proposes to assign or transfer its authorization to an entity that meets the financial caps for bidding in the entrepreneurs' blocks.

²⁹ However, revenue growth and asset growth during the five-year period will not be considered to the extent that such growth is due to "nonattributable" equity investments in the applicant (*see* Section III(E)(1)(c)); debt financing; revenue from or appreciation of assets attributable to other operations or other investments of the licensee or its attributable investors; or business development, expanded services or growth of revenues or assets in the ordinary course of business or as a result of acquiring additional licenses. As thus amplified, the financial caps would apply fully to the resulting entity in a takeover of the licensee, a control group member or an attributable investor.

2. Qualifying as a Designated Entity

In the entrepreneurs' blocks, the FCC has created preferences to assist small businesses, rural telephone companies, and businesses owned by women and minorities,³⁰ collectively referred to as "designated entities," in attracting the capital necessary to obtain a broadband PCS license. Designated entities are groups that Congress has identified as facing particular obstacles to PCS license ownership. The procedures were designed to ensure that designated entities are "given the opportunity to participate in the provision" of PCS services, as Congress directed in Section 309(j)(4)(D) of the Communications Act of 1934, as amended.³¹

a. Small Businesses

Small businesses are categorized as designated entities because those businesses are at a disadvantage in competing against companies with gross revenues of \$125 million or more. For a small business to qualify for preferential treatment as a designated entity, the applicant, including attributable investors and affiliates, must have average gross revenues for the three preceding years not in excess of \$40 million. For purposes of determining whether an entity qualifies as a small business, the control group and attribution rules set forth with respect to eligibility to bid in the entrepreneurs' blocks govern. Thus, the gross revenues and assets of certain investors will not be counted toward the financial caps if the applicant has a control

³⁰ Minorities include Blacks, Hispanics, American Indians, Alaskan Natives, Asians and Pacific Islanders. The term does not include persons with disabilities or other "socially disadvantaged" groups.

³¹ See 47 U.S.C. § 309(j)(4)(D).

group that controls the applicant, holds at least 25 percent of the equity, and, for corporations, holds at least 50.1 percent of the voting stock. In addition, at least 15 percent of the control group's equity must be held by small business principals. It should be noted, however, that the gross revenues of each attributable investor and each qualifying control group investor, as well as their affiliates, will be counted toward the \$40 million gross revenues threshold. However, small, publicly-traded corporations with widely dispersed voting stock and no controlling affiliates do not have to aggregate their revenues with the gross revenues and assets of management and shareholders for purposes of entrepreneurs' block eligibility and small business size status.³²

The FCC also allows a consortium of small businesses to qualify for any of the measures adopted for such designated entities. A consortium is a conglomerate organization formed as a joint venture among mutually-independent business firms. A consortium of small businesses may qualify for the preferences available to a small business if each business within the consortium individually satisfies the definition of a small business designated entity. However, a single corporate applicant formed by a group of small businesses will not receive the same treatment as a consortium.

³² As discussed in Section III(E)(1)(b), a small, publicly-traded corporation with widely dispersed voting stock is one in which no person owns more than 15 percent of the equity in the corporation, nor has the power to control the election of more than 15 percent of the corporation's board of directors. To qualify for the exemption, the corporation must own all of the equity and the voting stock of the entrepreneurs' block applicant or licensee.

b. Rural Telephone Companies

Recognizing that their existing infrastructure makes rural telephone companies well-suited to introducing PCS rapidly into less densely populated rural areas, Congress categorized rural telephone companies as designated entities. To qualify for preferential treatment as a designated entity, a rural telephone company must be a local exchange carrier having 100,000 or fewer access lines, including all affiliates.³³

c. Women and/or Minority Owned Businesses

Women and/or minority owned businesses have been given designated entity status due to discriminatory lending experiences as well as the exceptionally great financial resources believed to be required by broadband PCS applicants. The FCC presents two options under which women and/or minority owned businesses may qualify as designated entities. Under the first option, the minority and/or minority owned firms may sell up to 75 percent of the company's equity provided that no single investor holds more than 25 percent of the firm's equity, and the control group retains 50.1 percent of the voting stock. As an alternative, women and/or minority owned firms may sell as much as 49.9 percent of the equity to a single investor provided that the control group: (1) controls the applicant; (2) owns at least 50.1 percent of its equity; and (3) in the case of corporate applicants, holds at least 50.1 percent of the voting stock.

³³ A centralized equal access provider (*i.e.*, a group of rural telephone companies that provides centralized equal access and other sophisticated information services) will not be treated as an affiliate of each of its constituent members. See Section III(E)(4)(a) (discussing affiliation).

Whichever option is chosen, the establishment of a control group is determined in the same manner as for eligibility to bid in the entrepreneurs' blocks.³⁴ For example, winning bidders, transferees, or assignees must identify a control group on their short form application that has *de jure* and *de facto* control of the applicant and holds either at least 25 or 50.1 percent of the applicant's equity, depending upon the option selected. Moreover, if the 25 percent option is chosen (see Table 4a), only 15 percent of the control group's equity must be held by qualifying investors, *i.e.*, women and/or minorities, outright or in the form of options exercisable at any time, solely at the holder's discretion, at an exercise price equal to or less than the current market value of the underlying shares at the time of the short form filing. The other ten percent of the control group's equity may be held outright or as stock options or shares by: (1) investors in the control group that are women and/or minorities; (2) individuals who are members of an applicant's management team (who may be non-minorities or men); (3) existing investors of businesses in the control group that were operating and earning revenues for two years prior to December 31, 1994; or (4) noncontrolling institutional investors.³⁵ Similarly, if the 50.1 percent control group equity option is chosen, qualifying control group investors may hold a minimum of 30 percent of such equity, and the remaining 20.1 percent of equity may be held in any of the four ways described above (see Table 4b). Three years from the date of license grant, the qualifying control group members' minimum equity requirement may be reduced from 15 to 10 percent, if the 25 percent option is selected. Alternatively, the qualifying control group members'

³⁴ See Section III(E)(1) (discussing eligibility for entrepreneurs' blocks).

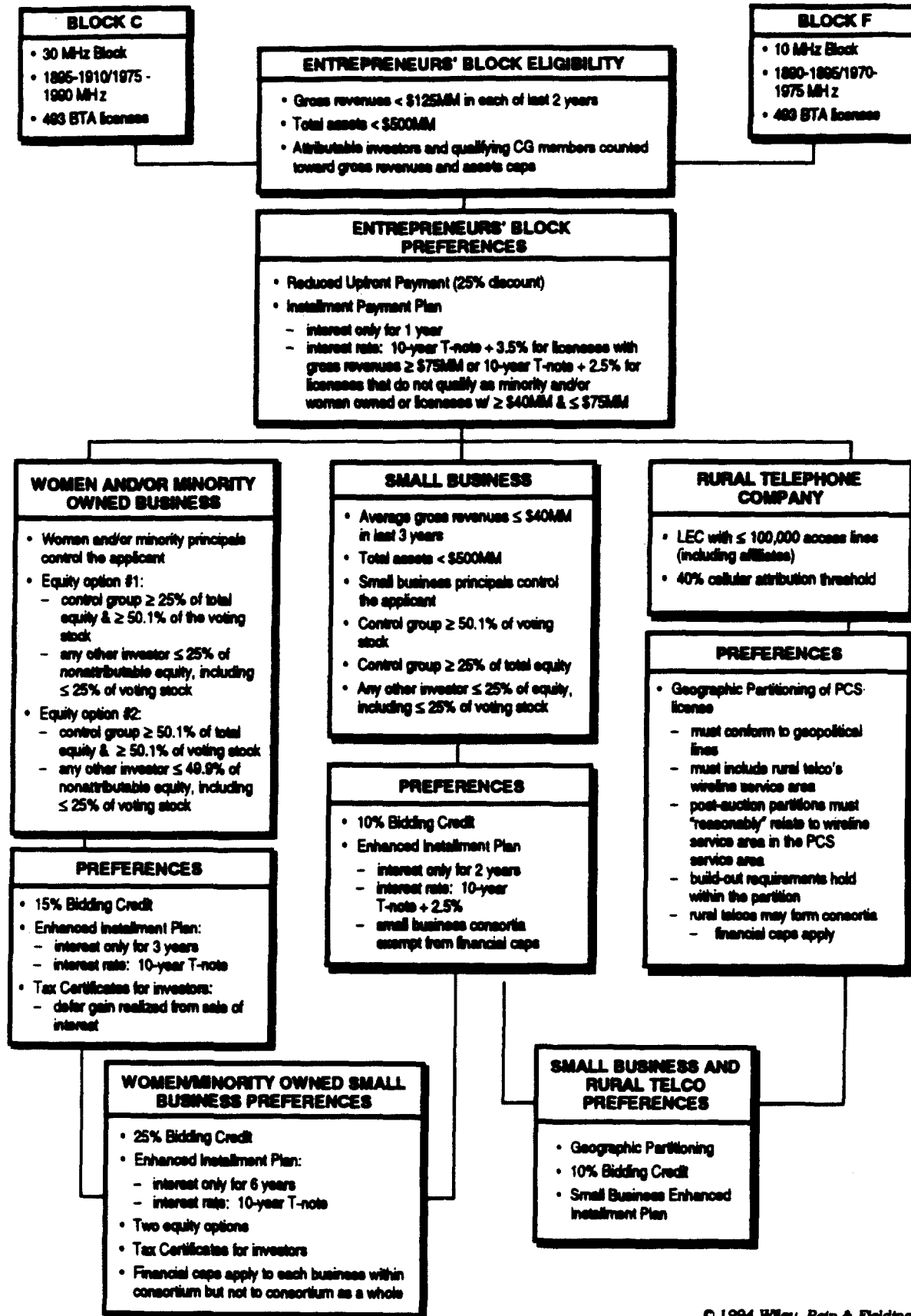
³⁵ For the definition of institutional investor, see Section III(E)(1)(b).

minimum equity requirement may be reduced from 30 to 20 percent after three years from the date of the license grant, if the 50.1 percent option is selected.

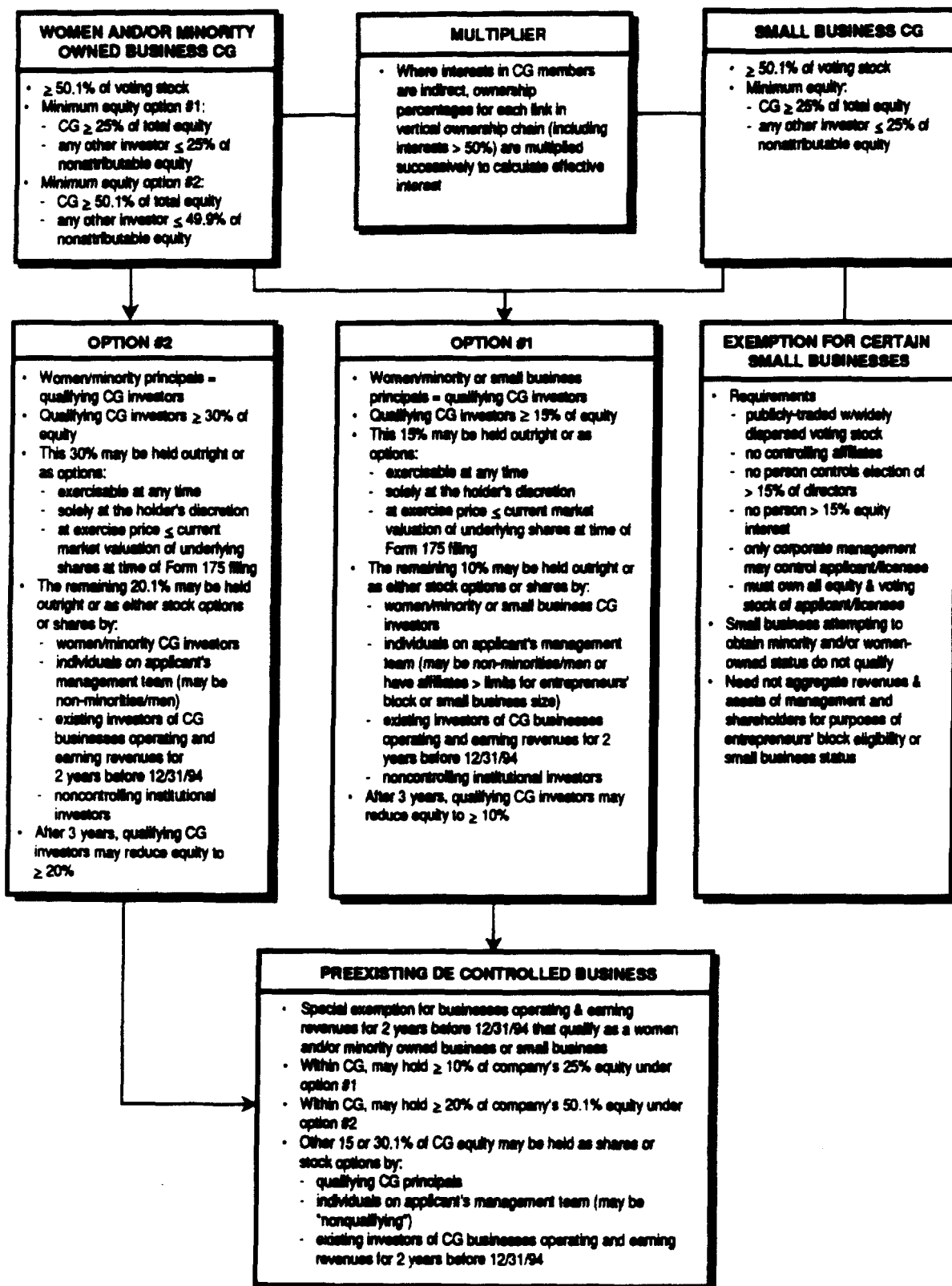
TABLE 4a: CONTROL GROUP OWNERSHIP OPTION A (No single attributable investor with more than 25 % equity)			
Participant Class	Voting Share	Equity Share	Investment Form
Control Group	50.1 %	25 %	Equity or Options Institutional Investors, Management Options, or Pre-existing shareholders
Qualified Designated Entities		15 %	
Noncontrolling Members		10 %	
Attributable Investor (per investor)	25 % or less	25 % or less	

TABLE 4b: CONTROL GROUP OWNERSHIP OPTION B (Attributable investor with more than 25 % equity)			
Participant Class	Voting Share	Equity Share	Investment Form
Control Group	50.1 %	50.1 %	Equity or Options Institutional Investors, Management Options, or Pre-existing shareholders
Qualified Designated Entities		30 %	
Noncontrolling Members		20.1 %	
Attributable Investor	25 % or less	49.9 % or less	

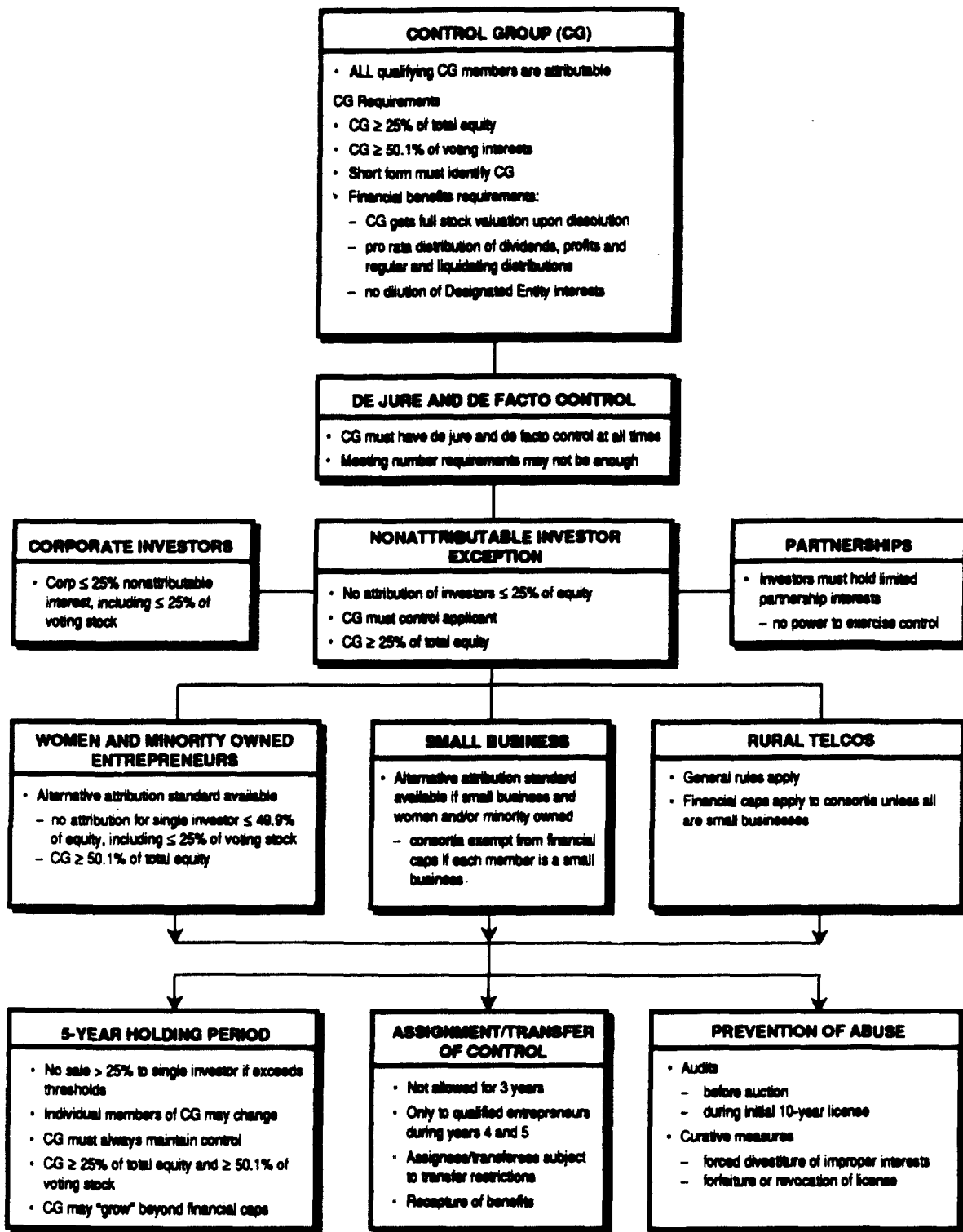
Designated Entity Eligibility and Preferences



Designated Entity Control Group (CG) Ground Rules



Basic Designated Entity Attribution Ground Rules



3. Designated Entity Preferences

Within the entrepreneurs' blocks, the FCC has provided certain benefits for smaller entrepreneurial companies, small businesses, and businesses owned by women and minorities. These benefits are summarized in Table 5, and discussed in more detail below:

TABLE 5: BIDDING PREFERENCES IN ENTREPRENEUR'S BLOCKS			
Bidder Class	Bidding Credit	Installment Payment Terms	Tax Certificates?
Entrepreneur (annual gross revenues > \$75M but < \$125M)	0	Rate equal to 10 year T-note rate + 3.5%	No
Small Entrepreneur (annual gross revenues < \$75M)	0	Interest only for 1 year; Rate equal to 10 year T-note rate + 2.5%	No
Small Business (annual gross revenues < \$40M)	10%	Interest only for 2 years; Rate equal to 10 year T-note rate + 2.5%	No
Women-Owned and/or Minority-Owned Business	15%	Interest only for 3 years; Rate equal to 10 year T-note rate	Yes
Women-Owned and/or Minority-Owned Small Business	25%	Interest only for 6 years; Rate equal to 10 year T-note rate	Yes

The FCC's rules also permit rural telephone companies, which are also designated entities under the competitive bidding statute, to partition markets among themselves and undertake bidding as a consortium.

a. *Reduced Upfront Payments*

The FCC will reduce the standard upfront payment of \$0.02/MHz/POP to \$0.015/MHz/POP for bidders that qualify to bid in the entrepreneurs' blocks. This 25 percent discount should facilitate auction participation by capital-constrained companies and permit them to conserve resources for infrastructure development after winning a license while still discouraging insincere bids.

b. *Installment Payments*

To assist capital constrained entrepreneurs and designated entities, the FCC has adopted a number of plans that allow such entities to pay for their licenses over time. Depending upon the class of entrepreneur and designated entity, the payment plans vary in terms of when principal must be repaid and the applicable interest rate. However, to ensure that these plans benefit only their intended recipients, the FCC has adopted very strict penalty provisions for installment payment licenses that are transferred or assigned to nonqualifying entities prior to the end of the license term.³⁶

Regular Installment Payment Plans. The FCC has also adopted a plan in which all licensees that satisfy the gross revenues and total assets criteria to bid in the entrepreneurs' blocks will be allowed to pay the remaining 90 percent of the net auction price for the license in installment payments. Generally, licensees with gross revenues exceeding \$75 million in each of the two preceding years are entitled to interest only payments for the first

³⁶ See Section V(E)(4) (discussing special transfer of control and assignment restrictions on entrepreneurs and designated entities).

year with principal and interest amortized over the remaining nine years of the license, accruing at the ten year Treasury note rate plus 3.5 percent. Licensees with gross revenues between \$75 million and \$40 million and that do not qualify as a women and/or minority owned business receive the same installment plan, except for a slightly more favorable interest rate of the ten year Treasury note rate plus 2.5 percent.

Enhanced Installment Payments. Under the enhanced installment payment plan, small businesses that win licenses in the entrepreneurs' blocks will be required to pay interest only for the first two years of the license term also at the ten year Treasury note rate plus 2.5 percent. Businesses owned by women and/or minorities may make interest only payments for three years, accruing at the ten year Treasury note rate without the additional 2.5 percent. Businesses that are both small and women and/or minority owned will be required to pay interest only for six years, again accruing at the ten year Treasury note rate without the additional 2.5 percent.

c. Bidding Credits

The FCC has adopted a bidding credit plan for designated entities who are winning bidders in the entrepreneurs' blocks that gives small businesses a 10 percent credit, and women and minority owned businesses a 15 percent credit. Since small firms owned by women and minorities suffer the problems endemic to both groups, the FCC grants them an aggregate credit of 25 percent. The rationale behind the bidding credit is that the credit will function as a discount on the bid price a firm will actually have to pay to obtain a license, and thus will address directly the financing obstacles encountered by these entities.

To ensure that bidding credits benefit the parties to whom the credits are directed, however, the FCC has adopted strict repayment penalties. If, within the original term of a license, the licensee applies to assign or transfer control of the license to an entity that is not eligible for as high a level of bidding credit, then the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify must be paid to the U.S. Treasury as a condition of approval of the transfer. A sale to an entity that would not qualify for bidding credits will entail full payment of the bidding credit as a condition of transfer.

d. Tax Certificates

As a means for attracting investors to designated entity enterprises and to encourage licensees to assign or transfer control of licenses to designated entities in post-auction transactions, the FCC has implemented a Section 1071 tax certificate program.³⁷ The tax certificate program entitles licensees and investors meeting the requisite criteria to defer gain realized upon a sale. Specifically, the licensees or investors receiving the tax credit can defer gain by: (1) treating it as an involuntary conversion under 26 U.S.C. § 1033, with the recognition of gain avoided by the acquisition of qualified replacement property; (2) electing to reduce the basis of certain depreciable property; or (3) both. Tax certificates will be available both to initial investors in minority and women owned businesses who provide "start-up" financing for acquisition of licenses at auction or in the post-auction market and investors who purchase interests within the first year after the license issuance, allowing for

³⁷ Entities seeking to make use of tax certificates should be aware that there is a bill pending before Congress that would eliminate the FCC's authority to issue tax certificates to designated entities.

the stabilization of the designated entities' capital base. In addition, the FCC will issue tax certificates to broadband PCS licensees in any frequency block that assign or transfer control of their licenses to minority and/or women owned entities.

Under this tax certificate policy, the entity in which the investment is made must satisfy the definition of women or minority owned businesses at the time of the original investment as well as after the investor's shares are sold. For post-auction market sales, tax certificates will be issued only to licensees that sell to entities that meet the definition. In general, tax certificates will be granted only upon completion of the sale.³⁸

In order to prevent "sham" arrangements to obtain tax certificates, the FCC has imposed a one-year holding requirement on the transfer of control or assignment of broadband PCS licenses by women and/or minority owned businesses that obtain such licenses through the benefit of tax certificates. An exception to this holding requirement, however, is that the FCC will permit the assignment or transfer of control of licenses during this period to other qualified minority and/or women owned businesses. An assignee or transferee who receives this license before the end of the original one-year holding period will also be subject to a one-year holding requirement from the date of consummation of the assignment or transfer.

³⁸ Parties may, however, request a declaratory ruling from the Commission regarding the tax certificate consequence of prospective transactions.

e. License Partitioning

Rural telephone companies are permitted to obtain broadband PCS licenses that are geographically partitioned from larger PCS service areas. Rural telephone companies will be permitted to acquire partitioned broadband PCS licenses in either of two ways. One method is to form a bidding consortium, consisting entirely of rural telephone companies, to participate in the auctions and then partition the licenses won among consortia participants. If rural telephone company consortia are formed to bid in the entrepreneurs' blocks, the cumulative gross revenues and assets of the consortium members may not exceed the financial caps for eligibility in these blocks.³⁹ A second allowable method of obtaining partitioned licenses is to acquire partitioned broadband PCS licenses from other licensees through private negotiation before or after the auctions.

Partitioned areas are required to conform to established geopolitical lines,⁴⁰ and must include all portions of the wireline service area of the rural telephone company applicant that lie within the PCS service area. Moreover, if a licensee obtains a partitioned license post-auction, the partitioned area must be reasonably related to the rural telephone company's wireline service area that lies within the PCS service area. There is no strict rule on the reasonableness of the partitioned area. Generally, the Commission will presume as reasonable a partitioned area that contains no more than twice the population of that portion of a rural telephone company's wireline service area that lies within the PCS service area.

³⁹ Each rural telephone company member of a consortium will, following the auction, be required to file a long-form application for its respective, mutually agreed-on geographic area.

⁴⁰ A geopolitical line, for example, is a county line.

Each licensee in each partitioned area will be responsible for meeting build-out requirements in its area.

f. Controlling Abuse

Procedural mechanisms have been adopted to ensure that the eligibility of bidders and recipients is *bona fide*. First, the FCC will conduct random audits before the auctions and during the initial ten-year license period to ensure compliance with its guidelines. Second, if individuals or firms attempt to circumvent the FCC guidelines described herein, the FCC may force divestiture of such improper interests. If the abuse is severe, where appropriate, the FCC will issue forfeitures or revoke licenses. The FCC is committed to ensuring that women, minorities, and small businesses be given the opportunity to be active entrepreneurs and not merely fronts for other entities.

4. Affiliation

a. In General

In order to prevent entities that do not meet the size standards from receiving benefits targeted to the smaller designated entities, the FCC has adopted specific affiliation rules. Entities are affiliates of each other when, either directly or indirectly: (1) one firm controls or has the power to control the other, or (2) a third party or parties controls or has the power

to control both. This control may be direct or indirect, and may be affirmative or negative, and it is immaterial whether control is exercised as long as the power to control exists.⁴¹

Ownership interests are calculated on a cumulative, fully-diluted basis. "Fully-diluted" means that agreements such as stock options, warrants, and convertible debentures will be considered as having a present effect and treated as if the rights thereunder have been fully exercised.⁴² These agreements, however, may not be used to provide an appearance of divestiture or termination of ownership interests before such actual occurrence.

Moreover, rights of first refusal and put options held by a designated entity will not be treated as fully-diluted for purposes of determining ownership interest.⁴³

The FCC has created limited exceptions to its affiliation rules for entities owned and controlled by Indian tribes or Alaska Regional or Village Corporations,⁴⁴ and for minority owned applicants and applicants owned by a combination of minorities and women.⁴⁵

⁴¹ An example of negative power to control is 50 percent ownership of voting interests in a concern, which is sufficient to block any stockholder actions.

⁴² The FCC will consider departing from the requirement that the equity of investors in minority and/or women owned businesses must be calculated on a fully-diluted basis only upon a demonstration, in individual cases, that options or conversion rights held by non-controlling principals will not deprive the minority and/or women principals of a substantial financial stake in the venture or impair their rights to control the designated entity.

⁴³ If, however, put options are arranged in combination with other terms of an agreement that deprive an otherwise qualified control group of *de facto* control, the FCC will no longer treat these options as fully-diluted.

⁴⁴ While the FCC excluded the gross revenues and total assets of these entities from its affiliation rules, a rebuttable presumption exists that gaming revenues will be considered for purposes of determining whether an applicant affiliated with an Indian tribe qualifies for the entrepreneurs' block or as a small business. See 25 U.S.C. § 450b for a definition of "Indian tribe."

⁴⁵ The gross revenues and assets of affiliates controlled by minority investors or members of an applicant's control group will not be counted in determining the applicant's compliance with the financial caps.

b. Directors, Officers, Key Employees, and Management

Affiliations may also arise where attributable investors or control group members of the applicant serve as directors, officers, or other key employees of another concern.⁴⁶ Affiliation arises if such persons represent either a majority or controlling element of another concern's board of directors and/or management. Thus, if a person with an attributable interest in a PCS applicant, through his or her other key employment positions or positions on the board of another firm, controls that other firm, then the other firm will be considered an affiliate of the applicant. If a director or officer does not control the applicant or otherwise have an attributable interest in the applicant, his or her outside affiliations will not be considered. Control may also arise through management positions where a concern's voting stock is so widely dispersed that no effective control can be established.

c. Identity of Interest

Affiliation can arise where parties have an identity of interest between or among themselves. For example, affiliation can arise between or among members of the same family or persons with common business interests. All financial interests of an applicant's spouse are attributed to the applicant unless they are recognized as legally separated by a court of competent jurisdiction in the United States. If legally separated, only the applicant's half of jointly-held property is attributed.

⁴⁶ A key employee is one who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

Other immediate family members are presumed to have an identity of interest.⁴⁷

However, this presumption is rebuttable by showing that the family members are estranged, that family ties are remote, or that family members are not closely related in business matters.

Finally, an identity of interest may arise among persons with common investments. For example, if two persons own stock in a corporation, and also have attributable interests in an applicant, their stock will be treated as if owned by one party and considered affiliated if together they would be a controlling interest. Parties with an identity of interest are treated as one person for the purposes of determining control.

d. Stock Ownership

Affiliation through stock ownership is also possible, where an applicant has:

- (1) control or the power to control 50 percent or more of the concern's voting stock; or
- (2) controls or has the power to control a block that is large relative to any other outstanding block of stock. Moreover, minority stock holdings are presumed to be controlling where two or more minority stockholders have approximately equal-sized holdings and those holdings, in the aggregate, are large relative to other stockholdings in the concern.

⁴⁷ The definition of immediate family is taken from the Small Business Administration rules. "Immediate family members" means father, mother, husband, wife, son, daughter, brother, sister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, step-father, step-mother, step-son, step-daughter, step-brother, step-sister, half-brother, and half-sister. See 13 C.F.R. § 124.100.

e. *Trusts*

Stock interests held in trusts are attributed to any person who: (1) holds or shares the power to vote such stock; (2) has the sole power to sell such stock; (3) has the right to revoke the trust at will; or (4) has the right to replace the trustee at will. Stock interests held in trust may also be attributed to the grantor or beneficiary where there is an extra-trust business, familia, or personal relationship between the trustee and either the grantor or the beneficiary. Additionally, voting trusts cannot separate voting power from beneficial ownership of voting stock if the primary purpose of the separation is to meet size eligibility rules.

f. *Waiver of Affiliation*

The FCC will not construe affiliation rules in a manner that causes the interests of passive investors to be attributed so long as the requirements of the attribution rules are met.

g. *Management Agreements and Joint Marketing Agreements*

Licensees should also be aware that in some circumstances, management agreements and joint marketing agreements may create *de facto* ownership interests that are attributable for purposes of the FCC's designated entity qualifying rules and the license cap. In general, a management agreement or joint marketing agreement will create an attributable interest by the system manager or joint marketer if the entity is involved in the setting of prices, terms, or conditions of service. Because these rules are subject to interpretation on a case by case

Applicant Affiliates

GENERAL PRINCIPLES

- Entities are affiliates of each other when:
 - one firm controls or has the power to control the other,
 - a third party controls or has the power to control both, or
 - there is an "identity of interest."
- Control may be affirmative or negative.
- Power to control is all that is necessary.
- Ownership interests are calculated on a fully-diluted basis.

WAIVER OF RULES

- So long as an eligible control group has *de facto* and *de jure* control, the FCC shall not construe affiliation rules to disallow passive investors.

TRUSTS

- Stock interests in voting trusts are controlled by any person:
 - who has power to vote such stock
 - who has the sole power to sell such stock
 - who has the right to revoke the trust or remove the trustee.
- Voting trusts cannot separate voting power from beneficial ownership of voting stock if primary purpose is to meet size eligibility rules.
- Stock interests held in trust may be affiliated where there is an extra-trust relationship between the trustee and either the grantor or beneficiary.

OTHER METHODS OF AFFILIATION

- Affiliations can also arise in other scenarios; e.g.:
 - contractual relationships
 - joint venture agreements
 - use of common facilities.

STOCK OWNERSHIP

- Affiliation where:
 - power to control $\geq 50\%$ of voting stock
 - minority block of stock large relative to any other block
 - two or more minority blocks of roughly equal size and large, when aggregated, relative to other blocks of stock.

OTHER COMPANIES' OFFICERS/DIRECTORS/KEY EMPLOYEES

- Affiliation where directors/officers/key employees of another concern:
 - are attributable investors in the applicant or control the applicant
 - control other concern's board of directors and/or management.

FAMILY & FRIENDS

Spouses

- Attribute all financial interests of applicant's spouse to applicant.
- Exception: attribute only share of jointly held property if the couple is legally separated.

Other Kinship Relationships

- Consider "immediate family members."
- Presume identity of interest exists.
- Presumption rebuttable by showing estrangement, family ties are remote, family members are not closely related in business matters.

Common Investments

- Identity of interest may arise among persons with common investments in more than one concern.